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No. 84-823

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent repeatedly contends (Br. in Opp. 4-5 (emphasis in original)) that "this case involves *personal* records, not 'financial records' nor 'business records' as petitioner would prefer to describe them." Respondent's assertion is highly misleading. To be sure, the subpoena and the lower court opinions described the records as "personal." But all that this description meant was that they were not the records of any corporation, partnership, or identified sole proprietorship. The suggestion that the subpoenaed records are not "financial" or "business" documents is flatly wrong, as a brief examination of the subpoena (Pet. App. 18a-20a) will reveal.

In the petition (at 12-13), we noted that the documents at issue in this case are not of an intimate, personal nature. In an effort to suggest otherwise, respondent tries (Br. in Opp. 12) to pass off the records of illegal drug deals as

"tantamount" to a "private diary." We do not believe that the Fifth Amendment privilege shields the contents of any voluntarily prepared documents (see Pet. 12-13); that the Fifth Amendment testimonial privilage does not independently safeguard privacy interests seems to us the logically inescapable conclusion from the settled principle that production may be compelled under a grant of appropriate immunity. But in any event, we very much doubt that drug ledgers are what members of this Court had in mind in suggesting that the contents of some intimate documents may enjoy Fifth Amendment protection. See *United States* v. *Doe,* No. 82-786 (Feb. 28, 1984), slip op. 2 (Marshall, J., dissenting); *Andresen* v. *Maryland,* 427 U.S. 463, 486 (1976) (Brennan, J., dissenting).

2. In the petition (at 10-12), we argued that the court of appeals' distinction between the records of a sole proprietorship and an individual's business records is legally unsound and impracticable. Respondent maintains (Br. in Opp. 13-14) that this distinction is analogous to the distinction in First Amendment law between commercial and noncommercial speech. There are two glaring flaws in this comparison. First, the court of appeals in this case did not distinguish between commercial and noncommercial records, for there can be no doubt that the subpoenaed records are of a commercial or business nature (see Pet. App. 18a-20a). Second, while the First Amendment undoubtedly protects the contents of speech, the Fifth Amendment privilege merely protects against compelled testimonial self-incrimination.

3. Respondent incorrectly suggests (Br. in Opp. 3-4 n.1) that subsequent events have mooted this case or rendered it unsuitable for review.

In November 1984, a deputy district court clerk turned over to the Assistant United States Attorney a box of documents that were supposed to have been screened to

remove materials protected by the attorney-client privilege. By mistake, a few privileged documents were included. As soon as the prosecutor recognized the privileged nature of these documents, she returned them to the court. Although there was no showing that these documents had been used against respondent in any way, the district court disqualified the Assistant United States Attorney and the case agents. The government appealed, and a judge of the Fourth Circuit stayed the order of disqualification. *United States* v. *John Doe No. 462,* No. 85-1001 (4th Cir. Jan. 2, 1985) (Wilkinson, J.).

These events have no bearing on the present case. The government has no intention of terminating the continuing investigation of respondent even if the disqualification order is affirmed.[1] Respondent notes that one of the privileged documents viewed by the Assistant United States Attorney is the list of assertedly "personal records" prepared by respondent's attorney in accordance with the district court's direction of April 13, 1984 (see Pet. App. 5a). However, it certainly cannot be argued that this occurrence rendered this case moot, since the Assistant United States Attorney's brief viewing of the list is hardly the same as examining and making evidentiary use of the documents themselves. In any event, if we are right that the Fifth Amendment does not protect respondent from having to comply with the subpoena, then the viewing of the list would not prejudice respondent and is thus entirely immaterial here.

3. Finally, there is no merit to respondent's suggestion (Br. in Opp. 15 n.8) that review is inappropriate on the ground that the court of appeals' decision does not conflict

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[1]If the disqualification order had not been stayed, however, certain aspects of the grand jury investigation would have been irreparably impaired.

with decisions of any other circuit, since the court of appeals' decision is fundamentally inconsistent with this Court's view of the Fifth Amendment privilege in *Doe* and *Fisher* v. *United States,* 425 U.S. 391 (1976). In addition, it conflicts with those court of appeals decisions that have followed this Court's reasoning. See *United States* v. *Schlansky,* 709 F.2d 1079, 1083 (6th Cir. 1983) (contents of cancelled checks, bank statements, invoices, and receipts not privileged because privilege does not protect contents of "personal papers" that are "less private" than a diary); *United States* v. *Doe,* 628 F.2d 694, 695 (1st Cir. 1980) (privilege does not protect contents of accountant's "personal business records"); *In re Grand Jury Proceedings,* 626 F.2d 1051, 1052 (1st Cir. 1980) (privilege does not protect doctor's "personal business records"). Indeed, the court of appeals in this case acknowledged this conflict (Pet. App. 12a).

For these reasons and the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

JANUARY 1985

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